1863

SUPREME COURT OF THE UNITED STATES.

No. 163.

JAMES UDALL, LIBELLANT AND APPELLANT,

vs.

THE STEAMSHIP OHIO, HER TACKLE, &c., GEORGE LAW AND MARSHALL O. ROBERTS, CLAIMANTS.

APPEAL FROM THE CIRCUIT COURT U. S., FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Certificate of clerk of circuit court	1	1
" " " " district court	2	1
Proceedings in district court	3	1
Libel	3	1
Stipulation	8	3
Consents of counsel	9	4
Order of court	10	5
Stipulations	11	5, 6
Claim and answer of Law, Roberts, and Wetmore	15	7
Replication to answer	22	9
Testimony of Robert H. Allaire	24	10
" " Isaac Rollings	30	13
" " Wm. J. Blackham	31	13
" " Jeremiah Simonson	31	13
" " Archibald Udall	35	15
" " Jeremiah Simonson	36	15
" " Robert H. Allaire	37	16
Exhibits referred to in Allaire's testimony	38	16
Decree of district court	50	21
Notice of appeal	52	22
Appeal of libellant to circuit court	53	22
Bond for costs	56	23
Deposition of Joseph Bishop	58	25

GIDEON, Print.

	Original.	Print.
Exhibit marked Z	67	29
Certificate of Commissioner	68	29
Decree of circuit court	70	30
Appeal bond	71	31
Appeal to Supreme Court	73	32
Service of citation	77	33
Service of appeal	78	34
Citation	79	34

UNITED STATES OF AMERICA,
Southern district of New York, ss.

I, John W. Nelson, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify, that the writings annexed to this certificate are true copies of their respective originals on file, and remaining of record in my office.

[SEAL.]

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twelfth day of December, in the year of our Lord one thousand eight hundred and fifty-three, and of the independence of the United States the 78th.

JOHN W. NELSON, *Clerk.*

UNITED STATES OF AMERICA,
Southern district of New York, ss.

I, George W. Morton, clerk of the district court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify, that the writings annexed to this certificate are true copies of their respective originals on file, and remaining of record in my office.

[L. S.]

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of September, in the year of our Lord one thousand eight hundred and fifty-three, and of the independence of the said United States the seventy-sixth.

GEO. W. MORTON, *Clerk.*

At a stated term of the district court of the United States of America, for the southern district of New York, held at the city hall, in the city of New York, on Monday, the seventh day of April, in the year of our Lord one thousand eight hundred and fifty-one:

Present, the honorable Samuel R. Betts, district judge.

JAMES UDALL
vs.
THE STEAMSHIP OHIO, her tackle, &c.

September 20th, 1849. The libellant files his libel in the words and figures following:

To the honorable Samuel R. Betts, judge of the district court of the United States for the southern district of New York.

The libel and complaint of James Udall, of said district, lumber merchant, against the Steamship Ohio, her tackle, apparel, and furniture, and against all persons intervening for their interest therein in a cause of contract civil and maritime.

And thereupon the said James Udall alleges and articulately propounds as follows:

First. That some time in the years one thousand eight hundred and forty-seven and eight, the said vessel then being in process of construction by Bishop and Simonson, in the city of New York, and standing in need of certain trenails and other timber, the libellant did, at the request of said Bishop and Simonson, then in possession of and engaged in the building thereof, furnish in this State to, and for, and towards the building of said vessel, a large quantity of materials, timber, and trenails, more particularly described in the schedule hereto annexed.

Second. That the said materials, timber, and trenails were material and necessary for the said vessel to enable her to proceed to sea, make voyages, and earn freight, and the same were furnished upon the credit of the said vessel, as well as that of the owners thereof.

Third. That said materials, timber, and trenails were furnished at reasonable and fair prices, as will appear by reference to the said schedule, amount*ed* in the whole to the sum of two thousand nine hundred and seventy-three dollars and fifty-seven cents, of which sum there is still due and unpaid the sum of two thousand one hundred and fifty-nine dollars and twenty-eight cents, less trenails, which, not being used, were to be received back by the libellant, amounting to the sum of four hundred and sixty-eight dollars.

Fourth. That said ship was built in the city of New York, and has never yet left the port of New York, where she now lies.

Fifth. That although often requested, the owners or those in charge of said vessel have refused, and still refuse, to pay the said balance of one thousand six hundred and ninety-one dollars and twenty-eight cents, or any part thereof, to the great damage of the libellant.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court; in verification, if denied, this libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

Wherefore the libellant prays that process in due form of law, according to the course and practice of courts of admiralty and of this honorable court, may issue against the said steamship; and that all persons having or pretending to have any right, title, or interest therein, may be cited to appear and answer upon oath all and singular the matters so articulately propounded, and that this honorable court would be pleased to pronounce for the damages aforesaid, and otherwise right and justice to administer in the premises; and also to condemn the said Steamship Ohio, and all persons intervening therefor, in costs.

JAMES UDALL.

Sworn to before me, this 20th day of September, 1849.

GEO. W. MORTON,
U. S. commissioner.

C. L. BENEDICT, *Proct.*
E. C. BENEDICT, *Adv.*

To 18 pieces locust timber,	198 $\frac{10}{12}$	feet,	*a*	10	-	-	-	$248	53
" 1 do. do. do.	13 $\frac{6}{12}$	feet,	*a*	5	-	-	-	7	81
" 39 do. do. do.	411 $\frac{8}{12}$	feet,	*a*	10	-	-	-	514	57
" 19 do. do. do.	260 $\frac{7}{12}$	feet,	*a*	12	-	-	-	390	87
" 1 do. do. do.	19	feet,	*a*	6	-	-	-	14	25
								$1,176	03
Deduct $\frac{1}{2}$ inspection					-	-	-	6	96
								$1,169	07
To 33 pieces locust timber,	107 $\frac{11}{12}$	feet,	*a*	10	-	-	-	$134	90
" 4,000 36-inch trenails,		*a*	$130	-	-	-	-	520	00
" 4,000 34-inch do.		*a*	110	-	-	-	-	440	00
" 4,000 32-inch do.		*a*	95	-	-	-	-	380	00
" 4,000 30-inch do.		*a*	85	-	-	-	-	340	00
" 400 28-inch do.		*a*	65	-	-	-	-	26	00
" 785 26-inch do.		*a*	53	-	-	-	-	41	60
" 500 24-inch do.		*a*	44	-	-	-	-	22	00
								$3,073	57
Deduction made for rep. trenails					-	-	-	100	00
								$2,973	57
Amount down					-	-	-	$2,973	57
Cr. by returned trenails					-	-	$468 00		
" cash					-	-	814 29		
								1,282	29
								$1,691	38

Respondent's costs.

District court of the United States, for the southern district of New York.

Filed the 20th day of September, 1849.

Stipulation entered into pursuant to the rules and practice of this court.

Whereas a libel was filed in this court, on the twentieth day of September, in the year of our Lord one thousand eight hundred and forty-nine, by James Udall against the Steamship Ohio, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that the said vessel, her tackle, &c., may be condemned and sold to pay the demands of the said libellant, and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the libellant or his sureties, execution may issue against their goods, chattels, and lands, for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall appear and answer to the cause, abide by the final decree entered in the cause, and shall pay all such costs as shall be awarded against him by this court, or, in case of appeal, by the appellate court.

JAMES UDALL,
RICH'D S. WILLIAMS.

Taken and acknowledged, this 20th day of September, 1849, before me,
GEO. W. MORTON,
U. S. commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Richard S. Williams, party to the above stipulation, being duly sworn deposes and says, that he resides in the city of New York; that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

RICH'D S. WILLIAMS.

Sworn to, this 20th day of September, 1849, before me,
GEO. W. MORTON,
U. S. commissioner.

United States district court.

JAMES UDALL
vs.
THE STEAMSHIP OHIO, her tackle, &c.

I hereby consent to waive the issuing of process of attachment against the said ship, provided the claimants execute stipulations for costs, and value the latter in the sum of three thousand dollars, the stipulators to justify before the commissioner, and the claimant paying into court the costs of the officers of the court to the time of stipulating.

The claimants further to consent to appear and answer the libel on file on or before the second day of October next, and failing so to do, the defaults to be entered; the stipulation for value to represent the vessel, and to be signed by Prosper M. Wetmore and Marshall O. Roberts.

CHAS. L. BENEDICT,
Proctor for libellant.

September 20, 1849.

I consent to appear for the claimants, and that an order of court be entered pursuant to the terms of the above consent.

W. R. BEEBE,
Proctor for claimant.

1016.

At a stated term of the district court of the United States of America, for the southern district of New York, held at the city hall, in the city of New York, on Thursday, the twentieth day of September, in the year of our Lord one thousand eight hundred and forty-nine:

Present, the honorable Samuel R. Betts, district judge.

THE STEAMSHIP OHIO, her tackle, &c., ads. JAMES UDALL.

On reading and filing consents signed by the proctors for the libellant and claimants, and the terms being complied with, on motion of W. R. Beebe, esq., proctor for the claimants: it is ordered, that the appearance of the claimants be entered, and that no process of attachment issue, but that the stipulation for value represent the vessel.

District court of the United States, for the southern district of New York.

Filed the 20th day of September, 1849.

Stipulation entered into pursuant to the rules of practice of this court.

Whereas, a libel was filed in this court on the twentieth day of September, in the year of our Lord one thousand eight hundred and fifty-one, by James Udall, against the Steamship Ohio, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that the said ship, her tackle, &c., may be condemned, and sold to pay the demands of the libellant, and the parties hereto hereby consenting that in case of default or contumacy on the part of the claimants or their sureties, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels, and lands:

And whereas, also, a claim and answer is to be filed in said cause by Marshall O. Roberts and others:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are hereby bound in the sum of two hundred and fifty dollars, conditioned that the claimants abovenamed shall pay all costs and expenses which shall be awarded against them by the final decree of this court, or upon an appeal by the appellate court.

GEORGE LAW,
PROSPER M. WETMORE,
MARSHALL O. ROBERTS.

Taken and acknowledged, this 20th day of September, 1849, before me,
GEO. W. MORTON,
United States commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Prosper M. Wetmore and Marshall O. Roberts, parties to the above stipulation, being duly sworn, depose and say, and each for himself

saith, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

PROSPER M. WETMORE,
MARSHALL O. ROBERTS.

Sworn to this 20th day of September, 1849, before me,
GEO. W. MORTON,
United States commissioner.

District court of the United States, for the southern district of New York. In admiralty.

Filed the 20th day of September, 1849.

Stipulation entered into pursuant to the rules of practice of this court.

Whereas, a libel was filed on the twentieth day of September, in the year of our Lord one thousand eight hundred and forty-nine, by James Udall, libellant, against the Steamship Ohio, her tackle, &c., for the reasons and causes in the said libel mentioned; and whereas, the parties in interest have consented to file stipulation for costs and value, the latter in the sum of three thousand dollars, in lieu of the vessel being in the custody of the marshal, under the process to be issued in pursuance of the prayer of said libel; and the claimants hereby further consenting to appear and answer the libel on file on or before the first Tuesday of October next, as appears from said consent now on file in said court; and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimants or their sureties, execution for the above amount may issue against their goods, chattels, and lands.

Now, therefore, the condition of this stipulation is such, that if the stipulators undersigned shall at any time upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the abovenamed suit may proceed, and upon notice of such order or decree to W. R. Beebe, esquire, proctor for the claimants of said vessel, abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue.

PROSPER M. WETMORE,
GEORGE LAW,
MARSHALL O. ROBERTS.

Taken and acknowledged, this 20th day of September, 1849, before me,
GEO. W. MORTON,
United States commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Prosper M. Wetmore and Marshall O. Roberts, parties to the above stipulation, being duly sworn, depose and say, and each for himself

saith, that he is worth the sum of six thousand dollars over and above all his just debts and liabilities.

PROSPER M. WETMORE,
MARSHALL O. ROBERTS.

Sworn to this 20th day September, 1849, before me,
GEO. W. MORTON,
United States commissioner.

JAMES UDALL
vs.
THE STEAMSHIP OHIO, her engine, &c. } In admiralty.

To the honorable Samuel R. Betts, judge of the district court of the United States, for the southern district of New York.

The claim and answer of Marshall O. Roberts, George Law, and Prosper M. Wetmore, owners of the Steamship Ohio, her tackle, apparel, and furniture, to the libel and complaint of James Udall, libellant, against the said Steamship Ohio, her tackle, apparel, and furniture.

And now, the said Marshall O. Roberts, George Law, and Prosper M. Wetmore, intervening for their interest in said steamship, allege and articulately propound as follows:

First. That the claimants and respondents are the true, sole, and lawful owners of the Steamship Ohio, her tackle, apparel, and furniture, and were such owners at the time of the filing of the libel in this cause.

Second. That some time in the year one thousand eight hundred and forty-seven, and on or about the 19th day of October, in said year, the claimants and Robert C. Wetmore, and Edwin Croswell, made and entered into a contract with Messrs. Bishop and Simonson, of the city of New York, ship-builders, to construct and build for them a steamship according to certain plans and specifications there furnished, and for a price in said contract named, the said Bishop and Simonson to furnish all the materials therefor pursuant to said plans and specifications, the payments therefor to be made as the work should progress.

Third. That in pursuance of said contract so entered into, the said Bishop and Simonson proceeded to build and construct the said steamship, and was from time to time paid on account thereof by the claimants. That while said contract was yet unfinished, and on or about the day of last, the said Bishop and Simonson failed in business, and made an assignment of all their property, and among the rest the contract in question; and the said Bishop and Simonson having so failed, the claimants, by the consent of the assignees of said Bishop and Simonson, proceeded to finish, and did finish, the said steamship under the said contract; and the said steamship was duly delivered to the said claimants by the said assignees, and accepted and received by them, and the said contract price paid in full on or about the day of last.

Fourth. That although, as these claimants allege the truth to be, the libellant well knew that the said Bishop & Simonson had failed and made an assignment long before the completion of said contract, he neglected to notify the claimants, or either of them, of the existence of any real or pretended claim of his against the Steamship Ohio, and these claimants were entirely ignorant thereof until after said steamship had been completed in pursuance and under said contract, she had been delivered and accepted, and the whole of said contract price paid; and these claimants submit that though the libellant had at any time a lien upon said steamship, which they solemnly deny, still by reason of such laches on his part, said demand has ceased to be a lien upon said ship.

Fifth. These claimants answering deny that the libellant ever, within the meaning of the statute, at the request of either the master, owner, or agent of the said steamship, furnished towards the building of said steamship any of the materials set forth in the schedule annexed to said libel, although they are informed and believe and therefore admit, that a part of the materials set forth in the libel were used for that purpose, but what portion these claimants are unable to state, but they allege not the whole of the materials set forth in the said libel.

Sixth. These claimants further answering say, that they have no doubt that such portions of said timber and trenails as were used for that purpose were material and necessary to enable said vessel to proceed to sea, and make voyages, and earn freight, but these claimants deny that said timber and trenails, or any part thereof, were furnished on the credit of either the said steamship or the owners thereof.

Seventh. And they further state on information and belief, that for years previous to the time stated in the said libel, the said Bishop & Simonson had been doing business in the city of New York, as shipbuilders, and had been from time to time in the habit of buying in the course of their business large amounts of locust timber on their individual and personal credit, and of having extensive business dealings with the libellants; and these claimants allege that the whole of the materials so alleged to have been furnished on the credit of said steamship were furnished exclusively on the personal credit of said Bishop & Simonson, and the bills for the same were rendered by the libellant to the said Bishop & Simonson in the name of their firm, and a considerable portion of the bills so rendered was for materials to be used for other purposes, and were never used in the building of said Steamship Ohio; and further, that the libellant received from said Bishop and Simonson their promissory notes at long dates for a large portion of the materials so alleged to have been furnished, one of which for the sum of twelve hundred dollars is still held by the libellant against the said Bishop & Simonson.

Eighth. That the amount of timber and trenails furnished and used in said steamship these claimants are ignorant, and what amount was returned these claimants are equally ignorant, but these claimants deny that either the owners of said vessel are indebted to the said libellant in any sum whatever, but they have no doubt that the said Bishop and

Simonson are indebted to the libellant in a sum including said note larger than the amount claimed in said libel.

Ninth. These claimants further allege the truth to be, that said libellant was well aware of the terms of the contract under which said Bishop & Simonson built said steamship, and that by the terms thereof he was to furnish the materials and receive the pay therefor from time to time as the work should progress.

Tenth. These claimants admit, that they refuse to pay the sum of two thousand six hundred and ninety-one dollars twenty-six cents, or any other sum.

Eleventh. That it is true, that the said steamship was built in the port of New York, and at the time of the filing of said libel had not left the port of New York.

Twelfth. That all and singular the premises herein stated are true, but they deny that the libel herein is true, and they neither admit or deny the jurisdiction of this court.

Wherefore they pray that this honorable court would be pleased to pronounce against the libel aforesaid, and otherwise right and justice to administer in the premises, and to condemn the libellant in costs.

MARSHALL O. ROBERTS.
W. R. BEEBE,
Proctor for claimant.
DONOHUE, *Advocate.*

UNITED STATES OF AMERICA,
Southern district of New York, ss:

Be it remembered, that on this 10th day of December, A. D. 1849, before me, the subscriber, a commissioner duly appointed, &c., personally came and appeared Marshall O. Roberts, one of the claimants in the foregoing answer named, who being by me duly sworn did depose and say, that he had heard read the foregoing answer by him subscribed and knows the contents thereof; that the same was true of his own knowledge, except as to matters which are therein stated on his information and belief, and that as to those matters he verily believes the same to be true.

GEO. W. MORTON,
U. S. commissioner.

Filed Dec. 10, 1849.

In admiralty.

The replication of James Udall to the answer of Marshall O. Roberts, Joseph Law and Prosper M. Wetmore.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, says, that he will aver, maintain and prove his libel and complaint to be true, certain, sufficient in the law

to be answered unto; and that the said answer of Marshall O. Roberts, Joseph Law and Prosper M. Wetmore is uncertain, untrue and insufficient to be replied unto by this repliant, without that, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by his said libel and complaint he has already prayed.

C. L. BENEDICT,
Proctor for libellant.

At a stated term of the district court of the United States of America, for the southern district of New York, held at the City hall in the city of New York, on Thursday, the twentieth day of February, in the year of our Lord one thousand eight hundred and fifty-one:

Present: The honorable Samuel R. Betts, district judge.

JAMES UDALL
vs.
THE STEAMSHIP OHIO,
her tackle, &c.

This cause being called in its order on the calendar: Ordered hearing.

JAMES UDALL
vs.
THE STEAMSHIP OHIO, George Law and Marshall O. Roberts, claimants.

FEB. 21*st.*

Robert H. Allaire (sworn): Knows Bishop and Simonson; was their clerk in 1847–8–9. They built Steamer Ohio; libellant furnished some of locust timber, and all the trenails, for her.

Witness proves account made out by himself, of timber of trenails furnished by libellant, but cannot tell whether furnished for Ohio; made out the account for libellant from original bills rendered by libellant and from inspector's list.

(Bills read subject to objection,) marked A, B, C. Ohio was built in New York.

September 24, 1847. Memorandum in order book of B. and Simonson, for certain quantity of locust timber to James Udall.

B. and Simonson were not then building any other steamer as large as the Ohio. The trenails furnished by libellant were very large; saw workmen getting out some of the timber which he supposes went into ship; can't say he saw it so used. Some of the trenails were returned

to libellant. Witness gave to libellant an account of them; were not taken away by libellant till after the failure of B. and Simonson; they told him before failure they should have no use for those trenails and he might take them away.

Witness well understood B. and S. were about failing; those trenails were samples of large quantity bought of libellant by B. and S. There was no other ship building in that yard by B. and S. with Ohio. They had another yard in 12th street. Ohio was built between 5th and 6th streets; trenails were delivered in latter yard. Steamers State of Maine and Red Jacket were building in the other yard; one for Sound, the other a small boat to run to Elizabethport.

X. Went to B. and S., January, 1847; knew them several years previously. Mr. Bishop had been a ship-builder in New York very many years, and B. and S. were in partnership several years before witness went to them.

Has known libellant 10 or 12 years, and knows he dealt in locust timber and furnished ship-yards in New York, before he went to B. and S.; found they were customers of libellant when witness went there. B. and S. ordered the timber, and if witness was present he generally sent on the order; thinks was directed by S. in this case, and sent on the order for timber for B. and S., whilst Ohio was building. Libellant furnished other timber than what is specified in the accounts.

Bills were made up by witness for libellant in his presence, for the timber furnished. Bills D, E, F are the the original ones made out by witness, at the request of libellant, from which A, B, C were made up. These include total indebtedness of B. and S. to libellant; these were made out from time to time as the timber was furnished. Bills do not designate use of the timber or for what vessel.

A, B, C were made out long after B. and S. failed, and about the time libellant said he was going to commence the suit, and after D, E, F had been rendered, and after effects of B. and S. had passed to assignees; during the time the accounts run, and while the Ohio was building we received from Udall $3,746 $\frac{10}{100}$ in cash and merchandise. B. and S. also gave libellant a note for $1,000 on account generally, whilst the account was running, (produces receipt for it,) May 16, 1848. Exhibit G, exhibit H, September 26, 1848, receipt for $1,500.

September or October, 1848, libellant advanced B. and S. $500 cash, which B. said he had borrowed of libellant. The $1,000 note was not paid at maturity, September 19, 1848. It was returned and another note given for $1,200, including some other items of account, September 11, 1848, at 4 months; was given to take up $1,000 note; that was given up and credited it to libellant. Last note was not paid at maturity, never knew it was; has not been returned to his knowledge; stands charged on the books to libellant. Libellant was very often at the yard whilst Ohio was building. B. and S. paid notes after the $1,200 fell due. The $1,200 note not renewed to his knowledge; libellant gave receipt for it 5 October, 1848. (Rect. in witness handwriting, signed by libellant, exhibit I.) Libellant came to B. and S. about

the $1,200 note; can't say whether before or after it fell due. B. and S. failed last of March, (30,) 1849, the last Saturday. Libellant was frequently at the yard after the note fell due, and before failure of B. and S.

It was after that note became due and was unpaid that B. or S. told libellant he might take back the trenails.

Exhibit J admitted, subject to all exceptions; contract of B. and S. with Law and others for building Ohio. B. and S. made assignment day of their failure. Wright, Hiscox and Collins were assignees. The Ohio was then unfinished, and the assignees finished her, as he understood. They paid men who worked on her after the assignment. B. and S. dissolved partnership; libellant knew B. and S. made an assignment.

Witness made out bills A, B, C for libellant, between time of trial trip of Ohio and her going to sea; can't fix date of either date. Witness and libellant picked out from the other bills the timber which was supposed to have gone into Ohio. A few days before that there was a conversation between witness and libellant about his having a claim on Ohio; that was first time libellant said he was going down town to take advice on the subject.

Can't say whether libellant or inspector left the inspection bills at the office; came sometimes from seller and sometimes from buyer, and sometimes from inspector. Libellant knew, whilst ship was building, how B. and S. were to receive their pay.

From September, 1847, to failure, B. and S. built, or partly built, the State of Maine, Red Jacket, Sylph, and other, repairings all the while, ship Mechanic's Own.

It was their custom to use the timber of their yards indiscriminately, where it fitted.

Libellant's timber was mixed up with Hiscox's in the yard, and that was used for Mechanic's Own; cannot say whether libellant's timber was used or not. B. and S. generally bought of libellant, but also purchased of Bayley, Williams, Hiscox and others, in small lots, from September, 1847, to March, 1849.

Thinks assignees went on to pay men working on Ohio only for a week or two, until they could get business arranged. Witness entered in charge of the books for the assignees.

Wednesday, February 26th. Direct examination continued. Produces inspector's bills of timber. Exhibit A, Nov. 19, $514 $\frac{57}{100}$, is an inspector's bill; exhibit G, 4000 36-inch trenails on bill A.

Saw trenails delivered and counted, and checked, and telled them off in yard; cannot say when they were bought for the Ohio. Did not tally all of it. Supposed they were for Ohio, did not know it was so.

Q. Did Bishop and S. ever speak of the trenails as furnished for the Ohio?

Objected to.

Question admitted subject to objection.

Ans. Thinks he has heard them say so. Trenails were put in augur shop.

Had other trenails in yard at time; can't say certainly as to their size, but thinks some corresponded in size with those. Had no doubt these were for Ohio, but had no knowledge of the fact.

Libellant rendered bills, came to office and gave amount of quantity and inspector's returns, and wished witness to make up bills. Witness did so, and entered them on books and filed bills; thinks libellant only took amount of bills and left bills with witness.

Heard conversation between Simonson and libellant. S. requested libellant to sell the trenails for them; had used some, but remainder were too long for other vessels, and it was too great a sacrifice to cut them off. B. and S. had them used all except what were returned to libellant, some on Ohio, and some cut in two and used in State of Maine.

Timber in E and F was furnished by libellant during time the Ohio and other vessels were building. 22,244 trenails used in Ohio, according to accounts settled with men who drove them. Part of trenails came in vessel belonging to libellant.

X'd. Sent to libellant for part of timber, direction of B. and S.; wrote to him several times under their orders, conformably to the note in his order book.

Is now in employment of Simonson and Lugar—same M. Simonson. They are doing work for claimants; heard they were patching up Ohio, or something of that kind.

Isaac Rollings (sworn): Shipwright; worked on Ohio, planked and sealed her; did not use trenails, used locust timber in frame; put in locust timber, and understood from libellant it was his timber; that was said in yard, 5th street. Understood from Simonson that timber was coming from libellant; put in locust timber from 9 to 15 inches size; don't recollect using any smaller than 8 or 9 inches.

William J. Blackham (sworn): Ship fastener. Worked on Ohio, did iron fastening and copper. Witness counted the trenails as they came to the yard; libellant was present at the counting. Mr. Allaire sent witness to count them. Some came in sloop; last lot were large. Witness counted them. Don't know name of sloop, or whose she was. Don't know that libellant came with trenails; saw part of the trenails used for Ohio. There was no ship in yard which could take the same length of trenails, but Ohio. Witness counted the returned trenails at direction of libellant; part of same he counted when they came into the yard.

Jeremiah Simonson (sworn): Of firm of B. and S.; built the Ohio, her frame required timber of size of ordinary ships, and no larger, for siding. The floor of the ship required timbers of unusually large size. Libellant furnished the locust timber for stanchions between decks; witness thinks he ordered them himself.

Q. Did you order them for Ohio?

A. I gave him a general order, as was his custom; told libellant he wanted them for Ohio; thinks that was about May or June, 1848, not

positive what dates; but ship was ready for stanchions and very nearly done.

Libellant furnished some of the large trenails for the ship, not all.

X. Been shipwright since 1834–5; carried on business since 1841; known libellant since 1834 or 1837; was with Bishop and Simonson, his brother; learned his trade with them, and afterwards was partner with Bishop.

His brother and B. were carrying on the business in New York, doing a good deal of work, and they bought timber of libellant before witness went into business, and also of his father. Witness's brother died and he went into business with Bishop in April, 1841. From that time to their failure, March, 1849, were customers of libellant, and bought timber of him for their yards and business. Got principal part of locust of libellant except for ship Ohio; did not get principal part of that from him.

During that time had bills furnished from time to time, to Bishop and S., and never charged to ships; paid him by notes and cash; bought on their own credit and on nobody's else; he expects he knows of nobody else. Always got from him whatever was ordered, and never knew he declined crediting them until after the $1,200 note was given.

The original bills for timber, part of which was used for Ohio, made out against B. and S.; don't know of credit to any other person for it. That timber and trenails were ordered from libellant in same manner as timber had been always bought of him.

When stanchions were furnished he expected Ohio would be launched 5 August, and off their hands. Witness worked on ship a week or two after their failure, last March, 1849, and was paid by assignees. After that some arrangement was made with assignees; and Mr. Law after that paid witness. Ship was launched 5th August, 1848; she then went into hands of Law and others, as owners. He, as builder, never takes any charge of vessel after she is launched.

She made her trial trip last of August or 1st of September, 1849. Exh. F, 33 pieces of stanchions, $134 $\frac{00}{100}$, May or June, 1848. All the timber and trenails ordered from libellant were on a general order, and never, to his knowledge, specified the ship for which wanted.

Had at time two yards, and were in the habit of taking from one yard to the other any timber they wished to use; timber and trenails used for Ohio was about same in size as used for sea steamers and merchant ships of 1,000 tons.

Bishop was financier of concern, and witness active man in yard. Witness did not know, till sometime after the Ohio was launched, that concern would fail; did think so when he told libellant to take back the trenails; told him to do it because he had not been paid for them. Thinks libellant took them about time of failure; can't say if before or after. Saw libellant often after $1,200 note was due; he never pressed witness for money, can't say what he did to Bishop.

Directed sometimes orders to be given in writing. Libellant lives on Long Island, and when orders not given to him personally, were writ-

ten by Mr. Allaire, he supposes; can't say whether Bishop wrote any or not; witness did not.

X. Did not tell libellant that he recollects, that B. and S. were about failing when he told him to take trenails back; had several conversations about their failing.

Ohio registers about 2,500 tons. Thinks major part of the large trenails went into the ship; witness had no positive knowledge of the fact; thinks some were used in State of Maine; but were most too large for her.

Built Iris and Aurora, sea steamers, before Ohio, 450 ton; witness has since built Prometheus, keel laid, March last; 1300 tons registry.

X. These trenails were rather too long for merchant ships. First he ever heard libellant set up a claim against Ohio, was about the time of her trial trip.

Archibald Udall (or Murray) sworn, (colored man.) Witness had charge of sloop Gold Hunter, owned by libellant and Mr. Peck. Brought timber and trenails to B. and S.'s yard; timber was large; locust wood; trenails good size. Took it on board at Great Neck, where libellant lives, and took it by his direction; he said it was for Ohio, (objected to,) to be delivered at B. and S.'s yard. Does not know how much he brought; brought them more than once; can't say how many times. Delivered at foot of 5th street, thinks.

Recollects libellant and his man once helped put timber on board sloop.

X. Libellant said it was for ship Ohio; can't say her frame was up; told him before he took timber on board; don't remember when it was, what month or year.

Richard Udall (sworn): Father of libellant. Was in locust business 30 years or more, on his own account; at one time was connected with libellant, but not lately; were in equal partnership and retained right to a share in business till recently; when timber was furnished for Ohio, nothing was said about his interest; was willing libellant should have the profit, as witness had enough to live on. Witness used to sell timber to B. and S., and many other ship-carpenters. Know nothing of supplying Ohio, except what libellant said.

For 30 years delivered bills to person who ordered the timber, and was once told by Hicks that ship was liable; since that was always of impression that vessel was liable; after he heard of failure of B. & S., told libellant he thought ship was liable, and gave his reason, (as before;) always understood that ship was liable for timber since he talked with Hicks; but does not know that he ever had any conversation with libellant on subject till about time of failure of B. & S. Does not know of any custom to that effect amongst dealers in timber on Long Island.

Defence.

Jeremiah Simonson (again): When the large timber and trenails were furnished; ship not named; not known as Ohio; took the name

about time she was launched; she had a yard name, not Ohio. Butler King came on and named her and Georgia.

Robert H. Allaire (again): Never heard of name of Ohio to ship till just as she was launched; one ship named Georgia and the other Ohio, by Mr. King.

Testimony closed.

Exhibit A.

		Messrs. Bishop & Simonson, for Steamer Ohio, to James Udall,	Dr.
1847.			
Nov.	13.	To 18 pieces merch. locust timbers, 198 10-12 feet, *a* 10	$248 53
Nov.	13.	1 piece sec. locust timbers, 13 6-12 feet, *a* 5	7 81
	19.	39 pieces merch. locust timbers, 611 8-12 feet, *a* 10	514 57
Dec.	28.	19 pieces merch. locust timbers, 260 7-12 feet, *a* 12	390 87
		1 piece sec. locust timbers, 19 feet, *a* 6	14 25
			$1,176 03
		Deduct ½ inspection	6 96
			$1,169 07

New York, March 4, 1848.

		Messrs. Bishop & Simonson, per Steamer Ohio, to James Udall,	Dr.
1848.			
March	20.	To 33 pieces merch. locust timber, 107 11-12 feet, *a* 12	$134 90
		4000 36-inch trenails *a* $130 per th	520 00
		4000 34-inch trenails *a* 110 per th	440 00
		4000 32-inch trenails *a* 95 per th	380 00
		4000 30-inch trenails *a* 85 per th	340 00
		400 28-inch trenails *a* 65 per th	26 00
		785 26-inch trenails *a* 53 per th	41 60
		500 24-inch trenails *a* 44 per th	22 00
			$1,904 50
		Amt. bill locust rend. 4th March	1,169 07
			$3,073 57
		Deduction made for ref. trenails	100 00
			$2,973 57
		By ret. trenails $468 00	

Exhibit B.

1849.			
June	29.	To 41 pieces merch. lo. timber, 212 3-12 feet, *a* 7	$185 71
Nov.	13.	18 pieces merch. lo. timber, 198 10-12 feet, *a* 12	248 53
		1 piece sec. lo. timber, 13 6-12 feet, *a* 5	7 81
	19.	39 pieces merch. lo. timber, 411 8-12 feet, *a* 10	514 57
Dec.	28.	19 pieces merch. lo. timber, 260 7-12 feet, *a* 12	390 87
		1 piece sec. lo. timber, 19 feet, *a* 6	14 25
			$1,361 74
		Deduct ½ inspection	6 96
			$1,354 78

New York, March 4th, '48.

1072.

Exhibit C.

1848.					
March	20.	To 4000 36-inch trenails *a*	$130		$520 00
		4000 34-inch trenails *a*	110		440 00
		4000 32-inch trenails *a*	95		380 00
		4000 30-inch trenails *a*	85		340 00
		400 28-inch trenails *a*	65		26 00
		785 26-inch trenails *a*	53		41 60
		500 24-inch trenails *a*	44		22 00
		1600 20-inch trenails *a*	20		32 00
		1800 18-inch trenails *a*	18		32 40
		1600 14-inch trenails *a*	14		22 40
		33 pieces lo. timber, 107 11-12 feet, *a*	10		134 90
					$1,991 30
		Deduct ref. trenails			100 00
					$1,891 30

New York, September 16, '49.

Exhibit D.

Messrs. Bishop & Simonson to James Udell, Dr.

1849.					
Feb.	13.	To 125 3-12 feet merch. locust *a*	8		$125 25
		53 1-12 feet ref. locust *a*	4		2 62
					$127 87
		Deduct ½ inspection			87
					$127 00

Exhibit E.

Messrs. Bishop & Simonson to James Udell, Dr.

1847.					
June	29.	To 41 pieces merch. lo. timber, 212 3-12 feet, *a*	7		$185 71
Nov.	13.	18 pieces merch. lo. timber, 198 10-12 feet, *a*	10		248 53
		1 piece sec. lo. timber, 12 6-12 feet, *a*	5		7 81
	19.	39 pieces merch. lo. timber, 411 8-12 feet, *a*	10		514 57
Dec.	28.	19 pieces merch. lo. timber, 260 7-12 feet, *a*	12		390 87
		1 piece sec. lo. timber, 19 feet, *a*	6		14 25
					$1,361 74
		Deduct ½ inspection			6 96
					$1,354 78

New York, March 4, 1848.

Exhibit F.

Messrs. Bishop & Simonson to James Udell, esq., Dr.

1848.				
March 20.	To 4000 36-inch trenails a	$130		$520 00
	4000 32-inch trenails a	95		380 00
	4000 30 inch trenails a	85		340 00
	400 28-inch trenails a	65		26 00
	785 26-inch trenails a	53		41 60
	500 24-inch trenails a	44		22 00
	1600 20-inch trenails a	20		32 00
	1800 18-inch trenails a	18		32 40
	1600 14-inch trenails a	14		22 40
				$1,416 40
	4000 34-inch trenails a	110		440 00
				$1,856 40
	Deduct for ref. trenails			100 00
				$1,756 40
	53 pieces lo. timber, 107 11-12 feet, a 10			134 90
				$1,891 30

Exhibit H.

Rec'd, Sep. 26, 1848, from Messrs. Bishop & Simonson, fifteen hundred dollars.

$1,500.

For JAS. UDALL,
RICH'D S. WILLIAMS & CO.

Exhibit J.

Specification for a steamship to be built by Messrs. Bishop and Simonson, ship builders in the city of New York, for George Law, Marshall O. Roberts, Prosper M. Wetmore, Robert C. Wetmore, and Edwin Croswell.

The steamship shall not be less than two hundred and forty feet in length, government measure, by forty-five feet breadth of beam moulded, by twenty-four feet depth of hold from the top of the ceiling on the floor timbers to the top of the upper-deck beams in the centre of the ship, after deducting the curve of the beam; to have the masts and spars complete with the chains and dead eyes; the floor timbers to be all of the best white oak, to side eleven inches and to mould twenty inches in the centre, one hundred feet in the centre of the ship; the floor timbers to be laid close together, bolted together lengthwise of the ship with inch iron bolts; the keel of the vessel to be of the best white oak, twelve by sixteen inches; the vessel to have kelsons of the best white oak, of such size and dimensions, and placed and fastened as the superintendant may direct; the shoulder of the first futtock to be not less than fourteen inches in depth, the shoulder of the second futtock not less than twelve inches, the shoulder of the third futtock not less than ten inches,

the shoulder of the fourth futtock not less than nine inches; the frame to taper from this gradually to the top, to six and one-half inches by nine inches; siding the futtock to be all of white oak. The timbering space to be thirty-one inches; to have a live oak apron and transom, and inner stem post and breast hooks; the cant frames forward and aft, the knight-heads, and all the top timber to be of pine, oak, locust and cedar; stanchions to be of locust, the outside plank to be of white oak, six inches thick at the wales, and diminish downwards to four inches on the bottom; the garboard streaks all to be six inches in depth, the upper deck clamps seven inches, of yellow pine; lower deck clamps seven inches, of yellow pine; the clamp streaks shall be bolted together edgewise; side ceiling six inches, of yellow pine, bottom ceiling five inches, of yellow pine; bilge streaks twelve inches thick, yellow pine, as many as the superintendents may direct; waist to be yellow pine, four inches thick; to have a forecastle-deck, round stern, and a stem to form the cut-water, and be built in shape according to the model already made and agreed upon by the parties, which has three thousand tons displacement, at fourteen feet draught of water from the bottom of the vessel when planked; to have two decks the entire length of the vessel; deck plank to be white pine, three inches thick by five inches wide, and diminish to form the ends of the deck with the sweep of the sides of the ship; the deck beams to be of yellow pine, fourteen inches sided, mould eleven inches and eight inches at the ends, seven feet nine inches apart from centre to centre of beams, and two carlins between each beam; the beams to be kneed each with white oak knees, same as the main deck of the Steamship United States; the deck each to have water-ways, same as the main deck of the United States; the hatches shall be made and finished as the superintendent shall direct; there shall be a third deck from the engine to the after end of the ship, and also from the boilers to the forward end of the ship, kneed and finished the same as the other decks except the water-ways; the guard beams, and guards, and frame for the wheel-house, to be made as the superintendent shall direct; the ship to be copper fastened and copper butt bolted, eighteen feet high; above this to be iron fastened and butt bolted; all the fastenings to be satisfactory to the superintendent; there shall be a windlass and patent purchase made and put up complete; the vessel shall be finished and completed in every respect, including the out board joiner work, to the satisfaction of the superintendent; the ship shall have iron bolts running diagonally each way, every sixteen feet in length, from the upper deck to the centre kelson, the entire length of the ship; the sides of the vessel shall have flat iron bars running diagonally once in twelve feet each way, from the upper deck to the floor timbers in the inside of the ceiling of each side of the ship, at an angle of about forty-five degrees, well bolted through the ceiling to the frame of the ship; the beams on the upper deck to be filled in between each beam through the entire length of the ship with yellow pine chucks, the depth of the beam, so as to form a substantial support for the iron rods that run diagonally from the upper deck to the kelson; the flat bars of iron on the

sides of the ship, and the diagonal iron rods in the centre of the ship, and the fastenings to the same, shall be furnished by the owners, and the builders shall put them on as directed by the superintendent; there shall be four king-posts of best white oak, and iron rods to support the guard beams, made and put up as the superintendent shall direct; there shall be iron braces under the water-wheel beams; there shall be a fourth deck of white pine over the main deck between the king-posts that support the guard beams, put up and finished as the superintendent shall direct; beamings and frames of houses over the companion ways, and frame of house over the steering wheel aft, to be put up and securely fastened.

This agreement, made the nineteenth day of October, one thousand eight hundred and forty-seven, by and between Joseph Bishop and Jeremiah Simonson, (doing business in the city of New York under the firm name of Bishop and Simonson,) ship-builders, of the first part, and George Law, Marshall O. Roberts, and Prosper M. Wetmore, of the city of New York, and Robert C. Wetmore, of Staten Island, and Edwin Croswell, of the city of Albany, of the second part, witnesseth as follows:

That the said parties of the first part, in consideration of the agreements herein made by the parties of the second part, have agreed, and by these presents do agree, to and with the parties of the second part, that they will construct, build and complete, for the said parties of the second part, a steamship of the dimensions and materials mentioned in the specification hereunto annexed, and in all particulars conforming to the said specification, and to the directions which may be given by the superintendent of such building herein named, for the sum or price of one hundred and ten thousand dollars to be paid therefor, as hereinafter mentioned. The said steamship to be launched on or before the fifteenth day of August next, and as soon as launched to be placed at the disposal and under the direction of the said superintendent, for the purpose of receiving her engines and machinery, and thereafter to be fully completed so soon as the said superintendent shall require.

And that they will furnish all the materials for the said steamship according to the said specification, excepting only such as by the express terms of the said specification are to be furnished by the owners, (the said parties of the second part;) the whole to be built and constructed of materials of the best quality, and in the best and most workmanlike manner.

And in every particular which is not specifically named and provided for in the said annexed specification, the said steamship shall be built and constructed of such materials and in such proportions of each, and in such manner in every respect as the said superintendent may direct.

And the said parties of the second part, upon condition of the true and faithful performance of all things herein agreed by the parties of the first part to be done and performed, do hereby agree to pay to the said parties of the first part for the building of the said steamship the said sum of one hundred and ten thousand dollars by instalment, as the

materials therefor are delivered and the work progresses, the first payment to be made when the keel is laid, and the other payments at the end of every month successively thereafter; and the amount of such payments respectively to be in the same proportion to the whole amount to be paid, which the work done and materials delivered shall bear to the whole work and materials required for the full performance of this agreement by the parties of the first part.

And it is hereby mutually agreed, by and between all the parties to these presents, that the above named George Law shall have the superintendence and direction of the building and construction of the said steamship as the superintendent herein above, and in the said specification named.

In witness whereof the parties aforesaid have hereunto subscribed their names, the day and year first above written.

JOSEPH BISHOP,
JEREMIAH SIMONSON,
GEORGE LAW,
MARSHALL O. ROBERTS,
EDWIN CROSWELL,
PROSPER M. WETMORE.

In the presence of—
J. WASHBURN.

Final decree.

At a stated term of the district court of the United States of America, for the southern district of New York, held at the city hall, in the city of New York, on Monday, the seventh day of April, in the year of our Lord one thousand eight hundred and fifty-one:

Present, the honorable Samuel R. Betts, district judge.

JAMES UDALL
vs.
THE STEAMSHIP OHIO, her tackle, &c.

This case having been heard on the pleadings and proofs, and argued by the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court, that the libel filed in this cause be dismissed with costs to be taxed against the libellant.

And on motion of W. R. Beebe, proctor for the claimants, it is ordered, that unless an appeal be taken to this decree within the time limited and prescribed by the rules of this court, that the stipulations for costs and value executed by the claimants be canceled, and that the libellant pay into the registry of this court the amount of the stipulation for costs, and that the clerk distribute the proceeds in satisfaction of this decree.

U. S. district court.

JAMES UDALL
vs.
THE STEAMSHIP OHIO, her tackle, &c.

SIR: Please to take notice that we intend to appeal from the final decree in this cause to the next circuit court, to be held in the southern district of New York.

Yours, &c.

C. L. BENEDICT,
Proctor for libellant.

New York, April 16, 1851.

To W. R. BEEBE, esq., *Proctor for claimants.*
GEO. W. MORTON, esq., *Clerk of district court.*

Filed, April 17, 1851.

U. S. circuit court.

JAMES UDALL, libellant and appellant,
vs.
THE STEAMSHIP OHIO, her tackle, &c., George Law and Marshall O. Roberts, claimants.

To the honorable the circuit court of the United States, for the southern district of New York, in the second circuit.

The appeal of the above named appellant respectfully showeth:

That on or about the twentieth day of September, in the year one thousand eight hundred and forty-nine, the above named libellant exhibited his libel in the district court of the United States, for the southern district of New York, against the Steamship Ohio, her tackle, apparel and furniture, and all persons intervening for their interest therein, claiming more than fifty dollars, praying among other things, for the reasons set forth in said libel, to which for the contents thereof this appellant craves leave to refer, that the said steamship might be condemned and sold to pay the demand of the libellant and costs.

That thereafter, process having been waived by consent of the respective parties, on or about the twentieth day of September, eighteen hundred and forty-nine, the claimants duly appeared and filed their claim to the said vessel as the owners thereof, and by consent of the libellant a bond stipulation in the sum of three thousand dollars was filed in said court, to stand in place of said vessel.

That thereafter, and on or about the eleventh day of December, one thousand eight hundred and forty-nine, the said claimants filed their answer to said libel, wherein, among other things, they denied that the libellant was entitled to receive the said sum demanded in said libel, and prayed the said district court would be pleased to pronounce against the said libel, and condemn the libellant in costs, as by refer-

ence to said answer will more fully appear, and to which, for the contents thereof, the appellant craves leave to refer.

That thereupon the libellant filed his replication to said answer, and afterwards, on the twentieth, twenty-first, twenty-fifth, twenty-sixth, and twenty-seventh days of February, eighteen hundred and fifty-one, the said cause came on to be heard before the honorable Samuel R. Betts, judge of the said district court, upon the testimony adduced by the respective parties, and the said judge having advised thereon, on the seventh day of May, eighteen hundred and fifty-one, made a certain decretal order or decree in said cause, whereby it was, among other things, sentenced and decreed, that the said libel be dismissed, with costs to be taxed, as by a reference to said order will more fully appear, and to which, for greater certainty, this appellant craves leave to refer.

And this appellant is advised and insists that the said decree is erroneous, inasmuch as the libellant was entitled to recover the amount by him demanded in his libel.

And this appellant, for this and other reasons, appeals from the whole of the said decree to the next circuit court, to be held in said district, and on the said appeal they intend to have said cause heard anew on the pleadings and proofs in the district court, and other proofs to be introduced in the said circuit court.

And he prays that the record and other proceedings may be returned to the said circuit court, and that the said decree may be reversed and the said claimants compelled to pay the sum demanded in the libel, or such other decree therein made as to said circuit court shall seem just, and said appellees condemned to pay to the appellant his costs and damages in the premises.

C. L. BENEDICT, *Proctor.*
E. C. BENEDICT, *Advocate.*

Filed, June 26, 1851.

Circuit court of the United States of America, for the southern district of New York, in the second circuit.

JAMES UDALL, appellant,
vs.
THE STEAMSHIP OHIO, Law and Roberts, claimants, appellees.
} Bond for costs.

Know all men by these presents, that we, James Udall and Williams, are held and firmly bound unto the above named Law and Roberts, appellees, in the sum of five hundred dollars, to be paid to the said appellees, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the second day of July, in the year of our Lord one thousand eight hundred fifty-one.

Whereas the above named appellant has prosecuted an appeal to the

circuit court of the United States, for the southern district of New York, second circuit, to reverse the decree rendered in the above entitled suit by the judge of the district court of the United States, for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES UDALL, [L. S.]
THOMAS WILLIAMS, JR., [L. S.]

Sealed and delivered, taken and acknowledged, this 2d day of July, 1851; before me, GEO. W. MORTON.

THE UNITED STATES OF AMERICA,
Southern district of New York, ss.

James Udall and Thomas Williams, jr., being duly sworn, depose and say, and each for himself saith, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

JAMES UDALL,
THOMAS WILLIAMS, JR.

Sworn to this 2d day of June, A. D. 1851, before me.
GEO. W. MORTON.

UNITED STATES OF AMERICA,
Southern district of New York,
City, county, and State of New York, ss.

Be it remembered, that on this 23d day of September, in the year of our Lord one thousand eight hundred and fifty-two, I, John W. Nelson, a commissioner, duly appointed by the circuit court of the United States, for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act, in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, *at my office* at the United States courts, in the city of New York, in the said southern district of New York, in the State aforesaid, Joseph Bishop, to testify and the truth to say, on the part and behalf of the appellant, in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States, for the southern district of New York, wherein James Udall, appellant, against the Steam-

boat Ohio, respondent. And the said Joseph Bishop being about the age of years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Joseph Bishop, and he did thereupon depose, testify, and say as follows, viz:

I was one of the firm of Bishop and Simonson, who built the Steamship Ohio. I recollect the trenails furnished by Mr. Udall; I ordered them of him.

Q. And for what ship?

A. For that ship; she had no name at the time; she was afterwards called the Ohio. Mr. Udall and I were in the Merchant's Exchange building at the time they were ordered. We had a conversation at this time in relation to these trenails; I then calculated the size and length we should require for that ship, and told him to split them out and have them in readiness against we should want them. The number at that time was not defined, it was considerable of an order. The number was spoken of at the time, but I could not tell what I said to him about it. I am confident that I spoke of the number the ship would require, and I think it was twenty thousand the ship would want, of from twenty-four upwards to thirty-two inches in length. It appears to me they were not smaller than from 24 up to thirty-two inches, perhaps only thirty inches.

Q. Did they embrace the largest trenails used in the ship?

A. Yes, sir.

Q. Were they used in the ship?

A. Yes, sir, the principal part of them. I know of Mr. Udall furnishing large locust timber. That was ordered for the same ship by myself. When the ship was launched there was a large amount due me for building; I suppose there was twenty or thirty thousand dollars, but I don't pretend to accuracy. It was a large sum of money. I received some money afterwards. At the time Bishop and Simonson failed there was due them on the contract some twenty-three or twenty-four or five hundred dollars. Mr. Law represented the company for whom the ship was built; he was the only man we had anything to do with. At the time we commenced, he wished us to go ahead as fast as possible; afterwards when the ship was in frame he expressed himself, that we were progressing faster than needful; that we had better take off some of the men and not progress so fast. The reason was that they were not ready for the ship.

(Objected to.)

I have seen the paper marked exhibit Z, before, or one like it, about the time we failed. That is our account with Mr. Udall. The right-hand side is what we had from Mr. Udall, and the left-hand side is what we let him have. There is a charge to Mr. Udall of $1,500; there is a credit of $500; that is cash lent. These two charges have relation to each other. The fifteen hundred dollars was a $1,000 on on account of merchandise, and the $500 to pay cash borrowed. The money went through my hands, but whether it went directly from me

to Mr. Udall or not, I can't say. I do not know that Mr. Richard S. Williams had anything to do with our business, but he acted as a kind of a banker for Mr. Udall. I sometimes got money from him for Mr. Udall, and sometimes paid money to him for Mr. Udall.

Q. How was that $1,200 note made up?

(Objected to.)

A. That was a renewal of a note for $1,000, which was returned to us and credited on the other side, and a new note given for $1,200; the note now produced on part of appellant is the note, the following is a copy:

NEW YORK, 11 *Sept.*, 1848.

$1,200 $\frac{00}{100}$.

Four months after date we promise to pay to the order of James Udall, twelve hundred dollars $\frac{00}{100}$ *dollars*, for value received.

BISHOP & SIMONSON."

Endorsed:

JAMES UDALL,
RICHARD UDALL,
RICHARD S. WILLIAMS.

It has never been paid. I was not examined on the trial of this cause before. I attended court as a witness; left the city before I was called. I went to Charleston, S. C.

Cross examined.

I had been expecting to leave a week before I went. I was in attendance; I gave notice that I wished to leave for Charleston on Saturday. I believe I notified them two or three days before, and I left on the day I notified them I should. Our firm of Bishop and Simonson commenced in 1841. I had been in the habit of dealing with him during the time we were a firm, and a great while before that. We had two yards at the time the Ohio was building; we never had two, only about that time. We commenced to have two not far from the time when the Ohio was commenced. I don't think we had two yards for building purposes at the time we made the contract. We occupied the same ground for storing timber during the whole time our firm was in existence. To the best of my knowledge, the keel of the Ohio was laid at the time we commenced occupying the two yards. I was the out-door man, the of the firm. I was occasionally in the yard that winter; the time I gave to yard was the yard where the State of Maine was building. Simonson attended to the yard exclusively. It was the duty of both to make contracts for the timber; whichever happened to be present at the time. Letters and orders were generally written by Mr. Allair, the clerk. The orders were generally taken from the yard, and the people who take orders generally go to the yard. Mr. Udall was frequently at our yard. I met Mr. Udall in the Merchant's Exchange, in the year 1848, almost as early as we commenced the ship; it might

have been in the month of October or November; I only recollect from the circumstance that it was at the commencement. There were no frames together at that time; the moulds were together and the keel probably laid. I don't think I met Mr. Udall at the Exchange by appointment; I probably met him by accident. I don't remember any other time of meeting Mr. Udall at the Exchange. It was down-stairs in the saloon where we had the conversation. My impression is, that we had not started the State of Maine at that time; I should think we had not contracted for her. I think Mr. Simonson and I had some conversation about the trenails; the length that we should want the trenails had not been fixed between us. I presume there had been a conversation between me and Mr. Simonson as to where we should procure the trenails. I have no doubt that in the conversation Mr. Udall's name had been mentioned as the one we should procure them from. I can't say that I had been particularly requested to see Mr. Udall. I presume Mr. Simonson would have spokan to him if he had seen him first. I could not say how long it was before I met Mr. Udall that I had the conversation with Mr. Simonson; we may have had a conversation a fortnight before, perhaps less, I cannot remember how long. At the Exchange I asked Mr. Udall if he could give us the trenails for this ship. Mr. Udall was aware that we had the ship to build for Mr. Law; he had been informed of it, I think, by me; the matter had been in negotiation a month before the contract was signed. I know he was aware of the fact. I asked him if he could get us these trenails; the trenails this ship would require, that we were building for Mr. Law. I can't pretend to give the words of this familiar conversation. I went on to calculate the number and length we should want for the ship. He gave me a list of the prices of the different lengths.

Q. Did you make that calculation then at that time, or had you made it previously?

A. I made it there, at that time.

Q. Did Mr. Udall take any part in the making of that calculation?

A. No, sir.

Q. Upon what basis did you make that calculation?

A. Upon the number of frames the ship would have, and the number of trenails that would be required in each streak of plank.

Q. Had that calculation anything to do with the length of the trenails or only the number?

A. It had relation to the length. I knew at the time the size of the *moles*, and I knew that such a part would trenails of such a length.

Q. What number of trenails did you calculate would be required?

A. Perhaps something like twenty thousand.

Q. Do you remember what number you determined, upon that calculation, would be needed?

A. I do not remember particularly. My recollection would be based upon how much I supposed the ship would take.

Q. Did you state to Mr. Udall in that conversation what number of trenails would be required?

A. I stated the probable number.

Q. What number did you state?

A. I do not know what number I stated.

Q. How can you remember the size of the trenails and not the number?

Objected to.

A. The size is a specific thing, and I would not be so apt to forget, and there is not so much variation in the size, that is, one ship of the same size would require the same size as another, and the same number.

Q. Will you state positively that at that interview you said anything more to Mr. Udall than that you should need about a certain number of trenails of from twenty-four to thirty-two?

A. Yes, sir, there was more stated than that—the ship was spoken of.

Q. How long did that interview last?

A. A half an hour or more.

Q. Was the calculation you made in writing?

A. Yes, sir.

Q. Why did not you send the order to Udall by Allair?

A. It was not customary to send orders when we had the person on hand to give them to.

Q. Was Udall on hand?

A. He was on hand when I met him.

Q. Did you consider him on hand before you met him?

A. We should have waited a week before we sent him a letter.

Q. Was there a week past that he was not at that yard?

A. Probably there was not.

Q. You have spoken about some locust timber; did you give the order for that?

A. I had a conversation with him, but I believe I did not order it. I have no personal knowledge of the order for the locust timber; we had a conversation about the timber at the same time we had about the trenails, but I think he was not certain that he could get it.

(Counsel for respondents move to strike out the witness's evidence in regard to the order for the locust timber.)

Q. In what way do you know the amounts due to you from Law and Roberts at the time the boat was launched, and at the time of your failure?

A. From recollection of my books and no other source; the money went through my hands.

(Counsel for respondents calls for the production of the books, and moves to strike out the witness's evidence as to such accounts.)

Q. Was there any agreement between Mr. Udall and yourself with regard to the payment of the $1,500.

A. I don't remember any agreement. I don't remember anything

1018.

said about it. I understood the $1,500 was to pay a thousand dollars merchandise, and to repay the $500 for cash borrowed.

Re-examined.

Q. You have stated that you had a conversation with Mr. Udall about locust timber; what was the substance of that conversation about the timber?

A. The conversation was that we wanted timber, and to the best of my recollection that he did not know that he could get it.

Q. Had that any relation to that ship?

Objected to.

A. Yes, sir, it had relation to the ship.

Q. Did you request him to see if he could get it?

A. He presumed he could get it, or at least let us know whether he could get it.

JOSEPH BISHOP.

Exhibit Z.

Dr. Bishop & Simonson in acct. with Jas. Udall, Cr.

1848.			1848.		
May 20.	To bills payable....	$1,000 00	Mar. 4.	By merchandise....	$1,354 78
Sep. 30.	" cash.....	1,500 00	Sep. 16.	" do.	1,891 30
Oct. 7.	" bills payable....	1,200 00	Oct. 7.	" bills payable....	1,000 00
	" balance.....	1,173 08	"	" cash.....	500 00
			1849.		
		$4,873 08	Mar. 17.	" merchandise....	127 00
					$4,873 08
			1849.		
			Mar. 17.	By balance.....	$1,173 08
				" note on hand...	1,200 00
					$2,373 08

UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, John W. Nelson, a commissioner duly appointed by the circuit court of the United States, for the southern district of New York in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress, entitled "An act, in addition to an act, entitled 'An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed March 1st, 1817, and the act, entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, the testimony of witnesses in case of appeals *are* required by the rule of court to be taken before a United States commissioner.

I further certify, that a notification of the time and place of taking the said deposition, signed by me, was made out and served on the libel-

lant and appellant, to be present at the taking of the deposition, and to put interrogatories, if he or they might think fit.

I further certify, that on the 23d day of September, in the year of our Lord one thousand eight hundred and fifty-two, I was attended by the proctors for the respective parties and by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing, in the presence of the witness, and from statement and after carefully reading the same to the witness, subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of filing the same with my own hand in the court for which the same was taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand and seal, this 23d day of September, in the year of our Lord one thousand eight hundred and fifty-two, and of the independence of the United States the seventy-seventh.

JOHN W. NELSON,
United States commissioner, duly appointed by the circuit court of the United States, for the southern district of New York, in the second circuit.

Final decree.

At a special term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the City hall, in the city of New York, on Friday the fourteenth day of October, in the year of our Lord one thousand eight hundred and fifty-three.

Present: The honorable Samuel Nelson, an associate justice of the Supreme Court of the United States.

JAMES UDALL, appellant,
vs.
THE STEAMSHIP OHIO, &c., George Law & Marshal O. Roberts, claimants and appellees.

This cause having been heard on appeal, on the allegations and proofs of the respective parties, and argued by their counsel, and due deliberation being had: It is now ordered, adjudged and decreed, that the decree of the district court herein be affirmed, *and that the libel herein be affirmed*, and that the libel herein be dismissed with costs.

And on motion of F. B. Cutting, esq., counsel for the appellees, it is ordered, that the above named George Law and Marshal O. Roberts, claimants and appellees, recover of James Udall, libellant and appellant, their costs to be taxed. And on like motion, it is ordered, that

the stipulators for costs perform their stipulations, and that in default thereof, the appellees above named have execution to enforce this decree.

Bond for costs.

Circuit court of the United States, for the southern district of New York, in the second circuit.

JAMES UDALL, libellant and appellant,
vs.
THE STEAMSHIP OHIO, her tackle, &c., and George Law & Marshal O. Roberts, claimants and appellees.
} Bond for costs.

Know all men by these presents, that we, James Udall, of Queen's county, Long Island, appellant, and Wallace W. Williams, of the city of Williamsburgh, N. Y., grocer, and William Underhill, jr., of No. 183 Water street, New York city, druggist, are held and firmly bound unto the above named George Law & Marshal O. Roberts in the sum of six hundred dollars to be paid to the said appellees, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the thirteenth day of October, in the year of our Lord one thousand eight hundred and fifty-three.

Whereas the above named James Udall has prosecuted an appeal to Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above entitled suit by the judge of the circuit court of the United States, for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named James Udall shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JAMES UDALL, [L. S.]
WILLIAM UNDERHILL, JR., [L. S.]
WALLACE W. WILLIAMS. [L. S.]

Sealed and delivered, and taken and acknowledged, this thirteenth day of October, 1853, before me.

CHAS. ELIOT SCOVILLE,
U. S. comm'r.

UNITED STATES OF AMERICA,
Southern district of New York.

James Udall, Wallace W. Williams, William Underhill, jr., being duly sworn, do depose and say, and each for himself saith, that he is

worth the sum of twelve hundred dollars over and above all his just debts and liabilities.

JAMES UDALL,
WILLIAM UNDERHILL, JR.,
WALLACE W. WILLIAMS.

Sworn to this thirteenth day of October, A. D. 1853, before me.
CHAS. ELIOT SCOVILLE,
U. S. comm'r.

I approve the within bond.

SAML. R. BETTS.

New York, Oct. 14, 1853.
Filed Oct. 15, 1853.

(Copy.)

Appeal to the United States Supreme Court.

SUPREME COURT OF THE UNITED STATES.

JAMES UDALL, libellant and appellant,
vs.
THE STEAMSHIP OHIO, her tackle, and George Law and Marshall O. Roberts, claimants and respondents.

To the honorable the Supreme Court of the United States.

The appeal of James Udall, the abovenamed libellant and appellant, respectfully showeth, that on or about the twentieth day of September, one thousand eight hundred and forty-nine, the appellant, James Udall, filed his libel in the district court of the United States, for the southern district of New York, against the Steamship Ohio, her tackle, apparel, &c., and against all persons lawfully intervening for their interest therein in a cause of contract, civil and maritime, in and by which it was prayed that process might issue against the said steamship, and that all persons having or pretending to have any right, title, or interest therein, might be cited to appear and answer upon oath the allegations of said libel, and that said court would decree payment to the libellant of the sum by him in said libel claimed to be due, being the principal sum of one thousand six hundred and ninety-one dollars and thirty-eight cents, besides the interest.

That thereupon George Law and Marshall O. Roberts, intervening for their interest, filed stipulations for costs in the sum of two hundred and fifty dollars, and for value in the sum of three thousand dollars, and the claim and answer of George Law and Marshall O. Roberts, which answer, among other things, denies that the libellant is entitled to recover of the said vessel the sum claimed by him to be due, and prays that the said libel may be dismissed with costs.

That a general replication was thereafter duly filed, and the said cause came on to be heard before the honorable Samuel R. Betts,

judge of the district court aforesaid, on or about the twenty-first, twenty-fifth, twenty-sixth, and twenty-seventh days of February, eighteen hundred and fifty-one, and the said judge having advised thereon, on or about the seventh day of April following, made a decree dismissing said libel, with costs.

That after such decree, the libellant duly appealed therefrom to the next circuit court of the United States to be held in said district, and the said cause was removed thereby to said circuit court, and there tried anew upon the pleadings and proofs adduced in the district court, and new proofs adduced in the circuit court, and upon his said proofs and allegations claimed the said principal sum so due to him, with the interest, amounting, at the time of such trial in the said circuit court, to the sum of two thousand one hundred and sixty-four dollars and eighty-six cents, and such proceedings were thereupon had, that on or about the fourteenth day of October, eighteen hundred and fifty-three, the said circuit court made a final decree in said cause affirming the decree of the district court, and dismissing the said libel, which said decree of the said circuit court is, as the appellant is advised, erroneous, and ought to be reversed, inasmuch as the said libellant was entitled to recover on his said proofs and allegations the said sum of two thousand one hundred and sixty-four dollars and eighty-six cents.

Wherefore this appellant appeals from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the said decree of the circuit court, and the libel, answer, pleadings, depositions, evidence, and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew upon the pleadings and proofs in said circuit court, and such other evidence as may be adduced in the said Supreme Court, and that the said decree, and every part thereof, may be reversed with costs, and such sum be decreed to the libellant as he shall in law and justice be entitled to receive, or such other or further decree made as to the said Supreme Court shall seem just.

CHAS. L. BENEDICT,
Proctor for libellant and appellant.
E. C. BENEDICT, *Advocate.*

Dated New York, October 14, 1853.
Allowed October 14, 1853. SAM'L R. BETTS.

U. S. circuit court.

JAMES UDALL, libellant and appellant,
vs.
THE STEAMSHIP OHIO, her tackle, &c., and George Law and Marshal O. Roberts, claimants and respondents.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

William D. Jones, of the said district, being duly sworn says, that

on the twentieth day of October, 1853, he served on Marshal O. Roberts, one of the claimants and respondents in this cause, a copy of the annexed citation, by delivering the same with him, and at the same time showing him the original thereof.

WM. D. JONES.

Sworn to before me, this 21st day of October, 1853.

CHAS. ELLIOT SCOVILLE,
U. S. com'r.

U. S. circuit court.

JAMES UDALL, libellant and appellant,
vs.
THE STEAMSHIP OHIO, her tackle, &c., and George Law and Marshal O. Roberts, claimants and respondents.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles L. Benedict, of said district, being duly sworn says, that on the nineteenth day of October, 1853, he served the claimants herein with a copy of the annexed appeal, filed in this cause, by leaving said copy appeal for said claimants in the clerk's office of the circuit court of the United States, for the southern district of New York.

CHARLES L. BENEDICT.

Sworn to before me, this 21st day of October, 1853.

CHAS. ELLIOT SCOVILLE,
U. S. com'r.

Citation.

By the honorable Samuel R. Betts, one of the judges of the circuit court of the United States, for the southern district of New York, in the second circuit—to George Law and Marshal O. Roberts. [SEAL.]

Whereas James Udall, libellant, has lately appealed to the Supreme Court of the United States, from a decree lately rendered in the circuit court of the United States, for the southern district of New York, in the second circuit, made in favor of the Steamship Ohio, her tackle, &c., and of you, the said George Law and Marshal O. Roberts, claimants and respondents, against the said libellant, has filed the security required by law; you are therefore cited to appear before the said Supreme Court of the United States, at the city of Washington, on the fifth day of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, this fourteenth day of October, in the year of our Lord 1853, and of the independence of the United States the seventy-eighth.

SAM'L R. BETTS.